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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. 1

THE TEXAS AND PACIFIC RAILWAY COMPANY, ET AL.,

Appellants,

versus

THE UNITED STATES OF AMERICA, ET AL.,

Appellees.

Appeal from the United States District Court for the Southern District of Texas, Galveston Division.

FIRST SUPPLEMENTAL BRIEF ON BEHALF OF THE BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS, INTERVENING COMPLAINANT.

JOHN ST. PAUL, JR.,
Solicitor for the Board of Commissioners of the Port of New Orleans.

WM. C. DUFOUR,
LEONARD B. LEVY,
Of Counsel.

(35,666)

Montgomery-Andree Printing Co., Inc., 430-32 Chartres, N. O., La.

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May It Please the Court:

This Honorable Court ordered this case restored to the docket for reargument upon all questions involved and invited the attention of counsel to the question whether the respective relations of the Louisiana ports and the Texas ports to the export, import, and coastwise traffic affected, and to the rates condemned, by the orders in controversy are such that the Louisiana ports may be regarded as

localities unduly or unreasonably preferred by such rates within the sense and meaning of sections 3 (1) and 15 (1) of the Interstate Commerce Act and that the Texas ports may be regarded as localities unduly or unreasonably prejudiced by such rates within the sense and meaning of the same sections.

In support of the contention that the word "localities" as used in said sections does not include ports within its sense and meaning, we submit the following:

SUMMARY OF POINTS UPON WHICH INTERVENOR RELIES.

I.

Clause 5 of Section 9 of Article I of the *Constitution of the United States*, which reads:

> "No preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another",

includes preference by means of Railroad rates within the purview of the words "preference by any regulation of commerce."

II.

If the word "localities" in *Section 3* of the *Interstate Commerce Act* includes "ports" within its sense and meaning, that Section is unconstitutional as conflicting with *Clause 5 of Section 9 of Article 1* of the *Constitution of the United States.*

III.

The word "Localities" in *Section 3* of the *Interstate Commerce Act* does not include Ports within its purview, and the Louisiana Ports and Texas Ports may not be

regarded as "Localities" within the sense and meaning of that Section.

ARGUMENT.

I.

In *Gibbons v. Ogden, 9 Wheaton, page 1*, the contention was made that the commerce clause reading

> "To regulate commerce with foreign nations, and among several states and with the Indian Tribes"

did not include navigation within its meaning but only barter and sale.

Chief Justice Marshall held that it did include navigation, arguing that the circumstance that the 9th Section of the 1st Article of the Constitution prohibited preference by regulations of commerce of the Ports of one State over those of another showed that the power to regulate navigation had been given in the Commerce Clause—otherwise this prohibition would be meaningless.

The Commerce Clause was further extended to cover (not only navigation) but transportation by railroad.

A fortiori—as the commerce clause was extended to include railroad transportation within the meaning of the word "commerce", Section 9 of Article I, must likewise be extended to prohibit preference by railroad transportation within the meaning of the words "any regulation of commerce." Particularly when the first extension of the meaning of commerce to include navigation was predicated upon the existence of *Section 9 of Article I* in the Constitution.

As was said in *Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S., 1:*

> "The powers thus granted are not confined to the instrumentalities of commerce, or the postal system known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of times and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steam-boat, from the coach and the steam-boat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances."

If the powers granted are intended to keep pace with the progress of the country, the prohibitions must be likewise extended.

II.

The above proposition, being undoubtedly correct, we may rewrite *Article I, Section 9* as follows:

> "No preference shall be given by any regulation of railroad transportation * * * to the ports of one State over those of another."

Assuming that the word "localities" in *Section 3* of the *Interstate Commerce Act* includes Ports within its meaning we can rewrite *Section 3* to read as follows:

> "It shall be unlawful for any common carrier * * * to give any undue or unreasonable preference * * * to any * * * port * * * or to subject any * * * port * * * to any undue * * * prejudice or disadvantage * * *;"

and by reversing the language it will read:

> "Common carriers may give preference to any port and subject any port to prejudice or disadvantage, provided said preference, prejudice or disadvantage is not undue and unreasonable."

Consequently, if the word "localities" includes Ports, the Interstate Commerce Act allows preferences between Ports when not undue, whereas all preferences whether due or undue are forbidden by *Clause 5 of Section 9 of Article I* of the *Constitution of the United States.* And *Section 3* of the *Interstate Commerce Act* conflicts with *Clause 5 of Section 9 of Article I* of the Constitution.

III.

Therefore, the construction which saves the constitutionality or avoids the question of the constitutionality *vel non* of the Act should be adopted, to-wit: that the word "Localities" in *Section 3* of the *Interstate Commerce Act* does not include "Ports" within its sense and meaning, and the Louisiana Ports and Texas Ports may not be regarded as "Localities" within the sense and meaning of that section.

Respectfully submitted,

JOHN ST. PAUL, JR.,
Solicitor for the Board of Commissioners of the Port of New Orleans, Intervenor.

WM. C. DUFOUR,
LEONARD B. LEVY,
Of Counsel.

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THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. 1

THE TEXAS AND PACIFIC RAILWAY COMPANY, ET ALS.,
Appellants,

v.

THE UNITED STATES OF AMERICA, ET ALS.

THE PORT RELATION CASE.

Supplemental Brief on Re-argument as ordered by the Court, on Behalf of the State of Louisiana and the Louisiana Public Service Commission, Interveners.

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THE PORT RELATION CASE.

Supplemental Brief on Re-argument as ordered by the Court, on Behalf of the State of Louisiana and the Louisiana Public Service Commission, Interveners.

MAY IT PLEASE THE COURT:

This case was argued and submitted on October 12th and 13th, 1931, and, subsequently, the Court entered the following order:

> "May 31, 1932. This cause is restored to the docket for reargument upon all questions involved, and the attention of counsel is invited to

> the question whether the respective relations of the Louisiana ports and the Texas ports to the export, import, and coast-wise traffic affected, and to the rates condemned, by the orders in controversy, are such that the Louisiana ports may be regarded as localities unduly or unreasonably preferred by such rates within the sense and meaning of sections 3 (1) and 15 (1) of the Interstate Commerce Act, and that the Texas ports may be regarded as localities unduly or unreasonably prejudiced by such rates within the the sense and meaning of the same sections."

While in several of the original briefs filed both the facts and the law have been discussed, it has been considered that a summary of the facts will be helpful to the Court, and such a summary will be found in the supplemental briefs filed on behalf of the complainants, and by the New Orleans Joint Traffic Bureau, intervener, upon which summaries of facts we rely. We will confine this brief to a further discussion of the law, particularly with reference to the questions suggested by the Court, referring briefly to such facts as support our present reargument.

I.

THE RESPECTIVE RELATIONS OF THE LOUISIANA PORTS AND THE TEXAS PORTS TO THE EXPORT, IMPORT AND COAST-WISE TRAFFIC AFFECTED, AND TO THE RATES CONDEMNED BY THE ORDERS IN CONTROVERSY, ARE NOT SUCH THAT

THE LOUISIANA PORTS MAY BE REGARDED AS LOCALITIES UNDULY OR UNREASONABLY PREFERRED BY SUCH RATES WITHIN THE SENSE AND MEANING OF SECTIONS 3 (1) AND 15 (1) OF THE INTERSTATE COMMERCE ACT, AND THE TEXAS PORTS MAY BE REGARDED AS LOCALITIES NOT UNDULY OR UNREASONABLY PREJUDICED BY SUCH RATES WITHIN THE SENSE AND MEANING OF THE SAME SECTIONS.

The case involves *differentials* on export, import and coast-wise traffic only, moving through the Texas ports and through the Louisiana ports. It also involves the practice long followed by the appellants of keeping the rates from points on their respective lines on such traffic moving through the Louisiana ports on a parity with rates on similar traffic moving through the Texas ports.

Although the fact that export, import and coast-wise rates and traffic only are involved is emphasized in the briefs of the government, the commission, and the Texas interveners, (complainants before the commission), the case has been treated by them on brief, and disposed of in the order in controversy as if the controversy involved rates to and from the ports only. The traffic may come to rest temporarily at the respective ports; but it never loses its character as export, import, or coast-wise traffic, and is always to be classified as coast-wise or foreign commerce.

Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475.

Southern Pacific Term. Co. v. *Interstate Com. Comm.*, 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279.

Texas & N. O. R. R. Co. v. *Sabine Tram Co.*, 227 U. S. 111, 57 L. ed. 442, 33 Sup. Ct. Rep. 229.

Railroad Comm. of La. v. *Texas and Pacific Ry. Co.*, 229 U. S. 336, 57 L. ed. 1215, 33 Sup. Ct. Rep. 837.

The steamship rates beyond the ports, added to the rail rates to and from the ports, make the through transportation charges in all cases.

The export, import and coast-wise rates from points on the respective railroads of appellants to the port of New Orleans, the only port which they serve with their own rails, have been kept on a parity with similar rates to the Texas ports, which they do not directly serve, by the Texas and Pacific Railway Company for more than thirty years, and by the Louisiana Railway & Navigation Company, (Louisiana & Arkansas Railway Company), ever since that railroad has been in existence. The steamship rates are generally the same to and from both ports. The complainants of the ports of Texas allege that the said ports are *injured by the parity of rates* which has continued so long that millions of dollars have been invested in the port facilities at the Louisiana ports and at the Texas ports on the basis of the established relationship.

The facilities at the Louisiana ports are conceded to be superior in some respects to those of the Texas ports, which is due to wise and sagacious investments at the port of New Orleans, in port facilities, provided at great cost to the State of Louisiana, of such a nature that the export, import and coast-wise traffic will freely move from and to points on appellants' railways through the port of New Orleans on equalized freight rates.

The Commission in its final orders in controversy disrupted this long standing practice of appellants of keeping the ports of the two states on a rate parity by prescribing differentials on export import and coast-wise traffic moving through the port of New Orleans from and to points on their respective lines, over the rates on similar traffic moving through the Texas ports varying from 2 cents to 12 cents per 100 pounds, where the distance to New Orleans exceeds the distance to the Texas ports by more than 25 per cent.

As all of the rates from points on appellants' railroads to and from the Texas ports are joint through rates, neither of them can make the rates from and to such ports. They have no power independently to unduly prejudice the Texas ports or to unduly prefer the Louisiana ports, for undue preference cannot exist unless there is undue prejudice.

We contend and will endeavor to show that the situation is not such that the Louisiana ports may be regarded as *localities unduly or unreasonably preferred* by the rates condemned by the orders of the Commission in controversy

within the meaning of sections 3 (1) and 15 (1) of the Interstate Commerce Act, and that the Texas ports may be regarded as *localities unduly or unreasonably prejudiced* by such rates within the sense and meaning of the same sections.

This is true because the traffic through the Texas ports and through the Louisiana ports moves on the same rail and ocean rates, and, where the rates are the same, no undue preference or prejudice can result from them, assuming that the rates to the ports are reasonable, which is not in question.

The fact that a portion of the rate is for a rail movement to or from the ports does not in itself constitute a condition that can unduly prefer or prejudice either of the ports. Such an adjustment, initiated and long continued by the appellants with the approval of the Commission, of equalizing the rates from points of their respective lines on export, import and coast-wise traffic moving through the port of New Orleans with those on similar traffic moving through the Texas ports does not "make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic" when shippers may elect to ship via the Texas and Pacific Railway Company or the Louisiana Railway and Navigation Company (Louisiana and Arkansas Railway Company) through the port of New Orleans.

It is difficult to conceive that injury would result to the Texas ports because of the bare fact that the appellants, in order to protect their properties and compete for the export, import and coast-wise traffic moving to and from points on their lines to or through the only port they directly serve have established the policy of keeping the port of New Orleans on a rate parity with the Texas ports.

The Galveston Commercial Association in its brief has laid great stress on the fact that unless Galveston and Houston have differentials over rates to the Louisiana ports as have been prescribed by the Commission, the Texas ports will be seriously injured.

We can find nothing to justify this position. The Texas ports should be able to compete with the Louisiana ports on equal rates. If they cannot do so the trouble is not with the rates themselves; but rests upon other conditions existing at the Texas ports which the Commission has no power to overcome by an artificial rate adjustment brought about by adding differentials sufficient to overcome the natural advantages of the Louisiana ports. All the ports are favorably located. The Texas ports have a much greater territory for most of the export, import and coast-wise traffic involved than the Louisiana ports, because of their nearer locations to a greater producing and consuming territory than is adjacent to the port of New Orleans.

The Louisiana ports are entitled to their fair share of the traffic available to them, in order that their port facili-

ties may be used as fully as possible. Under the Commission's differential adjustment, it cannot obtain its fair share of this traffic, or, in fact, any of it.

II

THE RATES TO THE PORTS MUST BE JUST AND REASONABLE.

Section 1 (4) obligates every common carrier subject to the Act engaged in the transportation of passengers and property to provide and furnish such transportation upon reasonable request therefor, and "to establish through routes and just and reasonable rates, fares and charges applicable thereto."

Section 1 (5) requires that "all charges made for any service rendered or to be rendered in the transportation of passengers or property * * * or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful." A just and reasonable charge is lawful whether established by the carrier or prescribed by the Commission, but, when a complaint is filed as provided for in section 13, as was done in this case, alleging a violation of section 3 of the Act, then the corrective machinery of the entire Act comes into action and the Commission cannot disregard the plain remedial requirements of the law in disposing of a complaint alleging violation of the Act.

Brimstone R. R. & C. Co. v. *United States*, 276 U. S. 104, 72 L. ed. 487, 48 S. Ct. 282. *Beaumont S. L. & W. Ry. Co.* v. *United States*, 282 U. S. 74, 75 L. ed. 221. *Florida* v. *United States*, 283 U. S. 193, 75 L. ed. 291.

The manner in which complaints filed under section 13, "complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act in contravention of the provisions thereof", shall be disposed of are specifically set forth in section 15 (1).

Section 3 (1) (41 Stat. L. 479) must be read in connection with Section 15 (1) (41 Stat. L. 484), and when read together they contain definite requirements as to the procedure to be followed in disposing of a complaint of a violation of the Act filed under Section 13.

Section 3 (1) makes it unlawful for any common carrier subject to the act

> **"to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."**

Section 15 (1) provides

> "That *whenever, after full hearing, upon a complaint made as provided in section 13* of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own

initiative, either in extension of any pending complaint or without any complaint whatever, *the Commission shall be of opinion that any individual or joint rate,* fare, *or charge whatsoever demanded, charged, or collected by any common carrier or carriers* subject to this Act, *for the transportation of* persons or *property* or for the transmission of messages as defined in the first section of this Act, *or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers* subject to the provisions of this Act, *is or will be* unjust or unreasonable or *unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate,* fare, *or charge, or rates,* fares, *or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged* (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and *what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed,* and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed." (Our italics).

The word "differential" which is merely an arbitrary addition, undetermined as to its reasonableness *per se*, to an existing reasonable rate, or existing reasonable rates, is not used in this section, or elsewhere in the Interstate Commerce Act.

Section 15 (1) as shown, refers to complaints filed under Section 13 of the Act. The complaint herein was filed under Section 13, and as filed attacked the rates to and from Galveston as unjust and unreasonable under Section 1, and unduly and unreasonably preferential under Section 3, but at the hearing at Galveston the allegations as to the unreasonableness of the rates to and from Galveston and as to undue preference of other Texas ports were withdrawn. The other Texas ports then intervened, asking that they be accorded the same relief as might be given Galveston in its rate relationship to New Orleans and Mobile.

The question finally presented to the Commission, therefore, was confined to undue prejudice to the Texas ports and undue preference of the Louisiana ports.

Sections 3 (1) and 15 (1), read together, as they must be, bring before the Court three fundamental questions:

1. Whether the complaint was filed under section 13.

2. Whether the commission has, after *full hearing*, as required by section 15 (1), and otherwise, proceeded in strict accordance with the requirements of that section in disposing of the case before it.

3. Whether the appellant carriers have, by equalizing the rates on export, import and coast-wise traffic moving through the port of New Orleans with those applying on similar traffic moving through the Texas ports, unduly or unreasonably preferred the Louisiana ports or unduly or unreasonably prejudiced the Texas ports as to the export, import or coast-wise traffic moving through the respective ports.

III

1. THE COMPLAINT WAS FILED UNDER SECTION 13 AND THEREFORE HAD TO BE DISPOSED OF IN ACCORDANCE WITH THE REQUIREMENTS OF SECTION 15 (1).

As shown in the statements in the briefs filed on behalf of the appellants and the interveneers attacking the commission's order, the cases which ended in the orders of the commission being issued were formal complaints filed under section 13 by the Galveston Commercial Association against various railroads, including appellant railroads, alleging violations of both sections 1 and section 3 (1), afterwards amended so as to include only violations of section 3. Other Texas ports joined in the complaint by filing interventions with the Commission, and on the issues thus presented the Commission held its hearings and made its investigations, without investigating or giving consideration to the reasonableness or unreasonableness of the export, import and coast-wise rates to and from the ports. Under these circumstances, the formal complaint before

the commission having been filed under section 13, in order to comply with the Act, the complaint had to be investigated and disposed of in the manner prescribed in section 15 (1), which was not done, as we shall show.

IV

2. THE COMMISSION DID NOT ACCORD THE FULL HEARING AS TO THE REASONABLENESS OF THE RATES AND DID NOT DISPOSE OF THE CASE BY DETERMINING AND PRESCRIBING WHAT WILL BE THE JUST AND REASONABLE INDIVIDUAL OR JOINT RATE OR CHARGE TO BE THEREAFTER OBSERVED, OR THE MAXIMUM OR MINIMUM, OR MAXIMUM AND MINIMUM, TO BE CHARGED IN ORDER TO REMOVE THE UNDUE PREFERENCE OR PREJUDICE COMPLAINED OF, AS REQUIRED BY SECTION 15 (1).

In presenting our argument on this point, we are not to be understood as conceding that there was an undue preference or advantage in favor of the port of New Orleans or an undue or unreasonable prejudice against the Texas ports by reason of the rate adjustment complained of. On the contrary, we insist that neither undue preference or prejudice existed as a result of such adjustment. We do contend that if and when undue preference or undue prejudice is the only subject investigated, and the complaint is filed under section 13, it must be disposed of by fixing just and reasonable rates and not by making rates that are reasonable over the lines of only one railroad serving the only port on its line prohibitive of any movement of traffic by the addition of so-called "differentials." If this is not

true then section 15 (1), insofar as it deals with undue preference or prejudice resulting from rate adjustments, has no definite meaning.

On pages 20 and 21 of the original brief on behalf of the Missouri, Kansas & Texas Railroad Company et al., it is said,

> "In the brief on behalf of the State of Louisiana, at page 42 et seq., that appellant would treat the orders of the Commission herein designed to remove prejudice and preference as orders establishing differentials, and upon that theory such appellant claims that such orders are unlawful because not predicated upon a finding as to just and reasonable rates. Section 1 is in no way involved in this case and the orders relate solely to the removal of prejudice and preference found to exist in the rate structure. Preference or prejudice in rates is wholly without relation to their reasonableness. A charge may be perfectly reasonable under Section 1 and may create an unreasonable preference or advantage under Section 3. It was so held in Interstate Commerce Commission v. Baltimore & Ohio R. R. Co., 145 U. S. 263; United States v. Illinois Central R. R. Co., 263 U. S. 515."

The order of the commission prescribes certain "differentials" on the traffic involved moving through the port of New Orleans over rates applicable on similar traffic moving through the Texas ports. That is clear. These differentials were prescribed without regard to their reasonableness, but were set at a figure which gives the Texas ports such an advantage that no shipper would use the appellants lines to and from, or the facilities of the

port of, New Orleans, for to do so would place on his export, import or coast-wise traffic an additional transportation burden which he would not have to stand on shipments moving through the Texas ports. That also, is clear.

We do not rely upon Section 1 in our contention that, in a case where the Interstate Commerce Commission has jurisdiction to remove discrimination under sections 3 (1) and 15 (1), it must fix just and reasonable rates before it can remove such discrimination. Section 15 (1), is read into the complaint, and it sets out the duty of the Commission when dealing with a complaint filed under Section 13, where, undue preference or prejudice is found to result from "any individual or joint rate or charge whatsoever demanded, charged or received by any common carrier or carriers subject to this Act."

We rely upon the provisions of Section 15 (1) in support of our contention that in order to enter a valid order under Section 3 there must be a *full hearing* as to the unjustness or unreasonableness of the individual or joint rates alleged to cause the undue preference or prejudice and the Commission's order must contain findings supported by evidence that there is both undue and unreasonable preference or advantage on the one hand and undue or unreasonable prejudice or disadvantage on the other hand in respect of any particular person, company, firm, corporation, or locality, or any particular description of traffic. In other words, undue preference or prejudice must

both be proven and found by the Commission to exist, and Section 15 (1), as amended by the Transportation Act of 1920, provides the only method prescribed in the Act for the removal of undue preference or prejudice when rates and charges are the only question considered, by prescribing the "individual or joint rate, fare, or charge," etc., that thereafter shall be observed. The remedy is plain. Being specific, it is exclusive. *Incluso unius est exclusio alterius.*

The following requirements are mandatory: (1). There must be a full hearing. (2). The individual or joint rate, fare, or charge must be "unjust or unreasonable", "or unduly preferential or prejudicial", and, where the foregoing prerequisites are found in the order of the Commission, supported by evidence, then "the Commission is hereby authorized and empowered *to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum,* to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable to be thereafter followed, and to make an order requiring the carrier or carriers to cease and desist from such violation to the extent to which the Commission finds that the same does or will exist," and, the section further provides, the carrier or carrier "shall not thereafter publish, demand, or collect any rate, * * * or charge for such transportation * * * other than

the rate * * * or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed." (Feb. 28, 1920, c. 91, sec. 418, 41 Stat. 484.)

The Commission did none of these things. There was not a full hearing as to the justness or reasonableness of the rates. There was no complaint against the justness or reasonableness of the rates. There are no findings or orders determining what will be the just and reasonable individual or joint rate to be thereafter observed. There was no order fixing the just and reasonable maximum or minimum, or maximum and minimum rate or charge to be thereafter followed.

The intervening carriers supporting the order of the Commission say on page 21 of their original brief, quoted above, that "preference or prejudice in rates is wholly without relation to their reasonableness." They contend that a charge may be reasonable under section 1 and may create an unreasonable preference or advantage under section 3. In support of this statement they rely upon *Interstate Commerce Commission* v. *Baltimore and Ohio Railroad Company*, 145 U. S. 263, 36 L. ed. 699, and *United States* v. *Illinois Central R. R. Co.*, 263 U. S. 515, 68 L. ed. 417."

Both of these cases were based upon reports and orders of the Interstate Commerce Commission issued under the Act to Regulate Commerce as it existed prior to the Transportation Act of 1920.

The case of *Interstate Commerce Commission* v. *Baltimore and Ohio R. R. Co., supra*, decided by the Supreme Court May 16, 1892, was based upon an order rendered by the Commission in the case of *Pittsburgh, Cincinnati & St. Louis R. R. Co.* v. *Baltimore and Ohio R. R. Co.*, 2 *I. C. C.* 572, 579, "to compel the latter to withdraw from its lines upon which business competitive with that of the petitioner was transacted the so-called 'party rates' and to decline to give such rates in future upon such lines of road; also for an order requiring said company to discontinue the practice of selling excursion tickets at less than the regular rate unless such rates were posted in its offices as required by law." The case arose under sections 2 and 22 of the Act to Regulate Commerce. Section (2) provided,

> "That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful." (Feb. 4, 1887, c. 104, 24 Stat. 384.)

Section 15 as originally approved contained no reference to complaints filed under section 13. It did not empower the commission to fix a rate for the future. It was entirely rewritten in the Hepburn Act approved June 29, 1906. (C. 3591, sec. 4, 3 Stat. 589.)

The Hepburn Act (June 18, 1910, c. 309, sec. 12, 39 Stat. 551) conferred upon the Commission power to "to determine what will be the just and and reasonable rates, charge or charges to be thereafter observed as the maximum to be charged."

The Mann-Elkins Act, approved June 18, 1910, amended section 15, but made no change as to the "just and reasonable maximum rates" requirements.

The latter sec. 22, as amended by sec. 9 of the Act of March 2, 1889, (c. 282, 25 Stat. at L. 855, 862), provides, among other things, "that nothing in this Act shall prevent * * * the issuance of mileage, excursion or commutation passenger tickets." The issues were not the same as where a complaint is filed under Section 13, alleging violation of Section 3 (1), the procedure in which is governed by Section 15 (1).

Section 15 (1) as it then existed (1892) contained a general provision by which the Commission could require reparation for injury found to have resulted from anything "done or omitted to be done in violation of this Act, or of any law cognizable by said Commission, or by any common carrier," and further prescribed the method to be

followed by the Commission in enforcing its orders in Court. The original Section 15 was repealed June 29, 1906, having been superceded by the amendment of that date and its subsequent amendments.

In the *Knoxo Case, supra* (United States v. Ill. Central R. R. Co.), which has been discussed in the briefs heretofore filed, the court did say that,

> **"but the mere fact that the Knoxo rate is inherently reasonable and that the rate from competing points is not shown to be unreasonably low does not establish that the discrimination is just. Both rates may lie within the zone of reasonableness and yet result in undue prejudice." (American Express Company v. Caldwell, post.)**

This statement by Mr. *Justice Brandeis*, however, was preceded by the declaration that,

> **"to bring a difference in rates within the prohibition of Section 3 it must be shown that the discrimination practiced is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal unless it is shown that it is not justified by the cost of the respective services, by their values or by other transportation conditions".**

There were findings by the Commission in the *Knoxo Case* that the cost of the service from Knoxo was not greater than the cost of transportation from many other points which enjoyed the rate; that the value of the service was the same; and that other transportation condi-

tions incident to shipment from Knoxo were so similar to those of shipments from other points enjoying the lower rate that the prejudice to which the Swift Lumber Company had been subjected was unjust and unreasonable.

In the present case there is no finding by the Commission that the cost of the service on the Texas and Pacific and on the L. R. & N. (L. & A.) is the same or greater than on the railroads serving the Texas ports, and both of these railroads insist that the condemned rates to New Orleans afford them a profit.

American Express Co. v. Caldwell, 244 U. S. 617, 61 L. ed. 1352, was a case involving an order of the Commission fixing just and reasonable interstate express rates between Sioux City, Iowa and South Dakota points and directing the Express Company to remove an existing discrimination against interstate commerce by ceasing to charge higher rates between Sioux City, Iowa and South Dakota points than for substantially equal distances between such South Dakota points and five named South Dakota cities. The order of the Commission was enjoined in the lower court, (P. U. R. 1917 C, 471, 161 M. W. 132), and a writ of error was sued out to the Supreme Court of South Dakota to review the decree. The decree of the South Dakota court was modified by dissolving the injunction so far as it extended to rates in the competitive territory, but the case did not rest entirely upon a finding of undue preference or prejudice under Section 3, for prior to the order of the

Interstate Commerce Commission removing the unjust discrimination against interstate commerce by prohibiting the charging of higher rates to and from Sioux City than to and from five South Dakota cities, the Commission in its report declared that "the South Dakota rates are too low to be made the measure of interstate rates between Sioux City and South Dakota points." (*Traffic Bureau* v *American Express Company*, 39 I. C. C. 703).

The Commission had fixed just and reasonable interstate rates and the express company attempted to raise the intrastate rates to their level. The Commission's order was set aside for lack of definiteness in its application.

When the *Shreveport Case* was decided the Commission had no direct power to remove discrimination against interstate commerce growing out of the relation of intrastate and interstate rates. Nevertheless, the Commission exercised that power, by invoking section 3 of the Act; but before attempting to remove the undue preference and prejudice complained of, fixed the just and reasonable interstate rates to which level the intrastate rates were required to be raised. The action of the Commission in removing discrimination under Section 3 in the Shreveport Case in the manner described was based upon the specific finding that the intrastate rates of Texas resulted in injury to interstate shippers of Shreveport, La. Elaborate cost studies were made and the Commission, proceeding under

Section 1, made its findings as to just and reasonable interstate rates before attempting to remove discrimination under section 3.

Numerous cases have been decided by the Interstate Commerce Commission since the Transportation Act of 1920 under section 13 (4). Section 13 (4) of the Act enlarges the power of the Commission as it previously existed under Section 3 by giving it for the first time the power to remove undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce. Section 13 (4) provides that,

> "Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against intrastate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or

> discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

The same method of removing discrimination against interstate commerce growing out of the relation of interstate and intrastate rates is provided in section 13 (4), as is provided for removing undue preference or prejudice arising out of the relation of interstate rates in section 15 (1). As section 15 (1) is the section governing the procedure in the present case, and as the procedure to be followed under that section is similar to the procedure to be followed in cases arising under section 13 (4), it is pertinent to examine and analize the decisions dealing with the latter section.

In removing discrimination against interstate commerce due to the relationship of intrastate and interstate rates, the Commission, when proceeding under Sections 3 and 13, has recognized its duty to prescribe a reasonable basis of interstate rates before attempting to change the intrastate rates so as to remove undue preference of intrastate commerce and undue prejudice to interstate commerce. This was done by the Commission in the *Shreveport Case*, 234 U. S. 342, 58 L. ed. 1341, 23 I. C. C. 31. In the statement of the case by *Mr. Justice Hughes*, (now *Chief Justice*), it is said,

> "The Interstate Commerce Commission found that the interstate class rates out of Shreveport to named Texas points were unreasonable and it established maximum class rates for this traffic." (234 U. S. 346).

The discrimination against Shreveport was removed by requiring the carriers to cease and desist from charging higher rates for the transportation of any commodity from Shreveport to Dallas and Houston, respectively, and intermediate points, than were contemporaneously charged for the carriage of such commodity from Dallas and Houston towards Shreveport for equal distances. The case arose under section 3, prior to 1920 when the Commission was granted authority to deal directly with intrastate rates where such rates resulted in undue preference of intrastate shippers, localities and commerce and undue prejudice to interstate shippers, localities and commerce. In concluding its opinion the Court says,

> "So far as these interstate rates *conformed to what was found to be reasonable by the Commission*, the carriers are entitled to maintain them, and they are free to comply with the order of the Commission by so adjusting the other rates, to which the order relates, as to remove the forbidden discrimination." (Our italics.)

The Shreveport Case was sensational in its far reaching effects and, while it dealt with discriminations arising out of interstate versus intrastate rates still, the principle

which was established and the plan followed by the Commission and approved by the Court of fixing reasonable rates to which the level of the discriminatory intrastate rate should be raised, is applicable in a case where, as in the present one, the two rates compared applied on export, import, and coast-wise traffic from and to interior points to and from the ports through which the traffic moves.

As the *Shreveport Case* rested entirely upon the provisions of Section 3 (1), the interpretation by the Court as to the method to be followed by the Commission in removing undue preference or prejudice in a complaint filed under and limited to that section is applicable to the present case, where the complainants before the Commission rely entirely upon it.

There is no discrimination *per se* in the rates to the ports of Galveston and New Orleans being the same. All of the conditions surrounding the movement of the traffic to and from the coast-wise and foreign points must be taken into consideration by the Commission in a case which by the complaints has been limited to Section 3.

The Commission has in every case but one* arising under Section 13 (4) prescribed a just and reasonable scale of interstate rates and has, if unjust discrimination was found to result by reason of the lower intrastate rates, caused these rates to be raised to the level of the previously established just and reasonable interstate rates.

* Florida v. United States, *supra*.

In *Georgia Public Service Commission et al. vs. United States et al.*, 39 F (2d) 169, 170, (*Georgia Sand and Gravel Case*), the Court points out the mandatory duty of the Commission under Section 13 (4) in dealing with undue preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand. The Court says,

> "Section 13 (4) provides that the Interstate Commerce Commission, on finding discrimination by state rates, 'shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged.' The language is mandatory. One of four things must be done: First, make a fixed rate; second, make a maximum; third, make a minimum; fourth, fix both a maximum and a minimum. The order of Dec. 9, 1929, undertakes the last. *It required the establishment of intrastate rates, 'which shall not be lower, distance considered, than those contemporaneously applicable in the interstate transportation of the same commodities . . . . not exceeding the rates set forth in the appendix to this report, and heretofore found and prescribed as reasonable in No. 17517 for the inter-interstate transportation of said commodities.'* Elsewhere the order used the expression 'contemporaneously maintained by' the railroads. The maximum thus prescribed is the maximum scale definitely set forth in the appendix, and the same as the maximum in interstate commerce. No question is raised as to its validity. The minimum is the rate 'contemporaneously applicable,' or 'contemporaneously maintained' by a particular carrier in interstate commerce for the same distances. Whether the minimum

> is lawfully prescribed we all think depends on whether the order means by 'contemporaneously' the rates now applicable and now maintained by the railroads, which we think would be a certain and lawfully fixed minimum, *or whether it means the rates that may at any time in the future be applicable or maintained by the railroads in interstate commerce.* In the latter meaning we think the order would be unlawful, because, should in the future any of the interstate rates be altered, either by the railroads or by the Commission itself on the usual proceedings only, a change in the existing state rates would ipso facto result. Thus for all time in the future, until this order should be revoked, the Interstate Commerce Commission would have absorbed to itself the complete control of intrastate rates on these commodities, altering them by altering interstate rates without the hearing as to then conditions which is required by section 13 (4)." (Our italics).

When the *Georgia Sand and Gravel Case*, supra, reached the Supreme Court of the United States, on appeal from the decree of the District Court sustaining the order of the Interstate Commerce Commission, the Court, through Mr. *Justice Brandeis*, said,

> "It is true that when state rates are assailed on the ground that they result in undue prejudice to interstate shippers or discriminate against interstate commerce, the Commission must determine whether the existing interstate rates are reasonable, as it may not require intrastate rates to be raised above a reasonable level. Virginia Corp. Commission v. Aberdeen & R. R. Co., 136 Inters. Com. Rep. 173, 180."

On the same reasoning the Commission cannot require the export, import and coastwise rates to be raised above a reasonable level, nor disturb such rates when they result in no undue preference of the port of New Orleans, or undue prejudice to the Texas ports for the reason that no injury results to the Texas ports.

The great power conferred upon the Commission by the amended Section 15 (1), (41 Stat. at L. 484) must not be overlooked. Section 15 (1) empowers the Commission to prescribe minimum as well as maximum rates whenever it finds that any individual or joint rate or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to the act for the transportation of property, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, to prescribe what will be a just and reasonable rate to be observed in the future, or the maximum or minimum rate thereafter to be observed. The amendments of the Transportation Act, 1920, must be read in connection with section 3 of the original Interstate Commerce Act, (Comp. Statutes. Secs. 8564, 8565) and the similarity of the language used in section 13 (4) and in section 15 (1) indicates clearly that the Congress intended to and did prescribe the procedure to be followed by the Commission in removing a discrimination either under section 15 (1) or under section 13 (3), (4).

The similarity of sections 13 (4) and 15 (1) is striking. Both of these sections require a full hearing. Both set forth the method to be followed by the Commission in removing undue preference or prejudice.

Section 13 (4) provides that the Commission, in order to remove unjust discrimination found under that section to exist, "shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as in its judgment will remove such advantage, preference, prejudice, or discrimination."

Section 15 (1) is again reproduced under this section of our brief for convenient comparison with section 13 (4):

> "That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge, whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint, classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation

of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum, or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Plainly the Commission cannot require export, import, or coast-wise rates from points on appellants' lines to New Orleans to be raised above maximum reasonable rates. This requirement is found in both Sections 13 (4), dealing with the relationship of intrastate and interstate rates, and in section 15 (1), dealing with the relationship of interstate rates. In both cases the act requires that where the Commission finds that a rate or charge results in unjust or unreasonable discrimination, the Commission shall prescribe the rate or maximum or minimum, or maximum and

minimum thereafter to be charged. Such an order cannot be made by the Commission without a full hearing and consideration of the reasonableness of the rates in issue.

We again insist, therefore, that inasmuch as no showing or finding has been made that the rates from points on the respective lines of The Texas and Pacific and the Louisiana and Arkansas railways to the port of New Orleans on export, import and coast-wise traffic are not just and reasonable, or below the cost of the service, and inasmuch as the complainants amended their complaints so as to eliminate any alleged violation under Section 1; and inasmuch as the Commission in its order makes no finding that the rates and practices of the two appellants in maintaining an equality between such rates and those applicable from the same points on their lines to the Texas ports, result in unjust or unreasonable rates to either the Texas ports or the port of New Orleans, the order under attack is invalid on its face for lack of proper findings supported by evidence.

There could be no clearer case of an order of the Interstate Commerce Commission resulting in a practice which will equalize the fortunes and abilities of two competing ports than is presently before the Court, a practice which has been condemned by the Court.

V

3. THE TEXAS PORTS ARE NOT UNDULY OR UNREASONABLY PREJUDICED NOR ARE THE LOUISIANA PORTS UNDULY OR UNREASONABLY PREFERRED BY THE PRACTICE OF THE APPELLANTS IN KEEPING THE TWO PORTS ON A RATE PARITY AS TO EXPORT, IMPORT AND COAST-WISE TRAFFIC.

We believe that this is a case where the localities of the ports of Texas and those of Louisiana cannot be unduly prejudiced or preferred where the rates are the same to these ports.

The interior shipper must not be forgotten. He is interested in having a choice of ports. He has no choice under the orders of the Commission when he happens to be located a distance equal to 25 per cent greater from the port of New Orleans than from the ports of Texas. In seeking competitive routes, distance is of little consequence to the shipper. He is interested in securing transportation at the lowest available rates. He selects the port for export, import or coast-wise traffic through which the lowest rates apply. When two ports are available, he considers only the one which has the advantage in rates. Where the rates are the same to both ports, he chooses between them as his interests may require. If he ships grain or grain products to foreign countries, he finds at once that under the Commission's orders he must pay 2 cents more per hundred pounds for the rail haul if he desires to use the

port facilities of New Orleans, than if he ships through the Texas ports; if he ships cotton factory products, he finds it will cost him 12 cents per cwt. more through the port of New Orleans than through the Texas ports; if he ships cotton seed and peanut cake and meal, it costs him 5 cents per cwt. more through New Orleans than through Texas ports; cotton seed and peanut oil, 6 cents; packinghouse products, and related articles except soap, 8 cents; soap, 6 cents; turpentine and related articles 6 cents.

When he ships bagging (cotton bale covering), cotton bale ties and buckles, from foreign or coastwise points, he must pay 6 cents per cwt. more to ship through the port of New Orleans than through the ports of Texas; and on green coffee, imported, he pays 9 cents more for the traffic moving through New Orleans than on traffic moving through Texas ports.

With such advantages he ships through the Texas ports, and thus the port of New Orleans is deprived of its natural advantage of favorable location with relation to the gulf, a safe harbor, adequate port facilities, and of being the only port served by the two appellant railroads.

These "differentials" are destructive of all competition between the Louisiana ports and the Texas ports. The Commission says in its report,

> "Healthy competition is no less important between ports than between rail or water carriers." (R 3391).

Yet the "healthy competition" between the Louisiana ports and the Texas ports, made possible by the rate equalization practice of the appellants is sickened by the Commission's orders virtually destroying such competition, and unless these orders are set aside by the Court, competition, both between these ports, and the appellant railroads serving the port of New Orleans is eliminated.

The differential method of destroying competition between these ports recalls the practice of the Railroad Commission of Texas before the decision in the *Shreveport Case*, of keeping the intrastate rates in Texas a certain differential under the interstate rates, which effectively destroyed competition between Texas cities and border cities of the surrounding states. It was this practice which caused the Shreveport complaint to be filed, and resulted in the condemnation of the practice by the Commission in order that Shreveport shippers and shippers of other border points might compete in Texas with Texas cities and shippers. *Shreveport Case, Supra.*

With equalized rates to the ports, with the through ocean-rail rates, on export, import and coast-wise traffic—the total sum which the shipper pays for his transportation—being the same, there is no injury to the Texas ports, and unless there is injury there is no undue or unreasonable prejudice, nor can a preference exist where the rates themselves do not make or give an undue or unreason-

able preference or advantage to any particular person, company, firm, corporation, or locality, or to any particular description of traffic.

Our contention is that the respective relations of the Louisiana ports and the Texas ports to the export, import and coast-wise traffic affected, and to the rates condemned by the orders in controversy are not such that the Louisiana ports may be regarded as localities unduly or unreasonably preferred by such rates within the sense and meaning of sections 3 (1) and 15 (1) of the Interstate Commerce Act, and that the Texas ports may not be regarded as localities unduly or unreasonably prejudiced by such rates within the sense and meaning of the same sections.

VI
THE SITUATION AS TO THE APPELLANT RAILROADS.

The situation of the Louisiana Railway and Navigation Company, as set forth in its original brief, shows the disastrous effects upon that railway of the Commission's order. The main line of this company extends from New Orleans northeasterly across the State of Louisiana, terminating at the city of Shreveport, La. By acquisition of the Sherman, Shreveport and Southern Railway Company, operated for many years by the Missouri-Kansas and Texas Railway Company of Texas, the line was extended from Shreveport, La., to McKinney, Texas, a short distance northeast of Dallas. The total length of the line from New Orleans to McKinney is 508.33 miles. (R 1060, 1061).

The Louisiana Railway and Navigation Company was acquired by the Louisiana and Arkansas Railway Company under authority of the Interstate Commerce Commission (158 I. C. C. 477) by long time lease and stock purchase and the entire line is now operated by the Louisiana and Arkansas, which line operates 302 miles of its own in Arkansas and Louisiana, extending from Hope, Arkansas, to Alexandria, Louisiana, a distance of 194 miles, with an extension from Minden, Louisiana, to Shreveport, Louisiana, of 30 miles, and from Packton, Louisiana, to Vidalia, Louisiana, a distance of 76 miles.

This line does not reach any Texas ports, either directly or through its branch lines and has no relationship with any lines serving the Texas ports. It has always been the policy of the lines making up the present system to maintain rates to New Orleans on an equality with those to Texas ports on all commodities. The system has numerous connections with railroads that serve the Texas ports. If the export, import and coast-wise traffic originating at or destined to points in the differential territory moves to the Texas ports, as it will naturally do under the Commission's differential adjustment, this line will lose the long haul on a great portion of its tonnage. It's revenues will thus be depleted, it's services will consequently be crippled for lack of adequate revenue and the port of New Orleans will suffer by being deprived of its natural advantages due to its being the terminus of the line as well as to its adequate

port facilities. We do not believe that Section 3 was ever intended to be applied so as to deprive a railroad, such as the Louisiana Railway and Navigation Company and the Louisiana and Arkansas Railway Company of its right to serve the only port reached by its system on an equality of rates applying to other ports which can only be reached by a joint line haul nor can injury result to the Texas ports by reason of the equalized rates.

The case of the Texas and Pacific Railway Company is similar to that of the Louisiana Railway and Navigation Company and the Louisiana and Arkansas Railway Company except that the distances to and from points in the differential territory reached by the Teaxs and Pacific from and to New Orleans are somewhat greater than from points on the Louisiana Railway Navigation Company in differential territory to New Orleans. However, the principle is the same in both cases, i.e., that there is no undue preference to the port of New Orleans on the part of the Texas and Pacific and the Louisiana Railway and Navigation Company, now operated by the Louisiana and Arkansas Railway Company, in maintaining the same rates on export, import, and coastwise traffic moving through that port as apply on similar traffic moving through the Texas ports, and, there being no undue preference, it follows that there is no undue prejudice to the Texas ports in the sense in which these terms are used in sections 3 (1) and 15 (1) of the Interstate Commerce Act.

VII
THE SITUATION AS TO THE PORTS.

Both the ports of Texas and Louisiana are classified as Gulf ports, being on or adjacent to the Gulf of Mexico. Galveston is directly on the Gulf and Houston is reached by a ship canal connecting with the Gulf. The port of New Orleans is located on the Mississippi River about 100 miles from the Gulf. The ports of both states are engaged in competition in its largest sense. Both have adequate facilities for handling export, import and coast-wise traffic. Great expenditures have been made to provide facilities for this purpose at both the Louisiana and the Texas ports. Both are entitled without unreasonable restrictions, by operation of an order of the Interstate Commerce Commission or by the voluntary acts of the carriers serving them, to be served on a rate adjustment which will permit shippers to make a choice as to which port they desire to use. The natural advantages of neither of the ports should be taken away by an arbitrary and artificial rate adjustment. The interior shippers should be allowed this choice.

The port of New Orleans is entitled to participate in the export, import and coast-wise traffic that seeks exit from and entrance to the territory served by the appellant railroads. The erection of a rate barrier against the port of New Orleans by the differentials prescribed by the Commission deprives the Louisiana ports of this right and forces the traffic involved in this case to move through the Texas ports. The "differentials" prescribed eliminate the

port of New Orleans from the field of competition and thus not only unlawfully injure the port but also deprive the appellant railroads of a fair opportunity to handle the traffic through the port of New Orleans, and take from the shippers in the differential territory their opportunity to use the port of New Orleans.

This situation is entirely contrary to the spirit and purpose of the Interstate Commerce Act, as well as the preference clause of the Constitution of the United States. (Article I, section 9, par. 5). This preference of the ports of Texas over those of Louisiana is given by a regulation of commerce which is arbitrary and unjust and unwarranted by any of the facts of the case and which is not authorized by the Interstate Commerce Act. The fact that the preference arises out of a rate adjustment does not, in our opinion, change the situation. Congress itself could make no regulation of commerce which would give a preference to the ports of the State of Texas over those of the State of Louisiana, and, therefore, Congress could not delegate such a power to the Interstate Commerce Commission.

CONCLUSION.

In the original "Brief on Behalf of the State of Louisiana" the following subjects are discussed:

> "The Orders of the Commission attacked herein and sought to be annulled are unsupported by evidence and are invalid," pages 7 to 17.
>
> "Since the Texas & Pacific is an independently operated Railroad, and the Commission has so held, it cannot be found guilty of violation of section 3 because it adopts the policy of serving its only port at rates which are equal to those applying to Galveston on this particular description of traffic," pages 17 to 24.
>
> "Before a carrier can be deemed guilty of a violation of Section 3, it must be shown by convincing proof that the particular carrier is responsible for both the adjustment which creates the alleged undue preference and the undue prejudice. Where a carrier is not responsible for the act which causes the undue preference or prejudice, it cannot be held responsible for an alleged violation of Section 3," pages 30 to 40.
>
> "To bring a violation of section 3 under the control of the Commission, the prejudice or preference must be undue, and is not illegal unless shown by the evidence that it is not justified by the cost of the respective services, by their values or by other transportation conditions," pages 40 to 41.
>
> "The Commission is not authorized to prescribe differentials unless they are based upon a finding under Section 1 of the Interstate Commerce Act, that the rates themselves are just and reasonable, or unless predicated upon a finding as to just and reasonable rates," pages 41 to 48.

> "The orders of the Commission complained of, for the reasons stated, give a preference to the ports of the State of Texas over those of the State of Louisiana, and are, therefore, in conflict with Article 1, Section 9, Clause 5 of the Constitution of the United States," pages 48 to 53.
>
> "Rate adjustments which prevent the movement of traffic freely over a direct route to a port of importance, are not in accord with the dictates of Congress," pages 53 to 73.

In the "Conclusion" of that brief the Court's attention is directed to the fact that the case was decided by the Commission without regard to the justness or reasonableness or unjustness or unreasonableness of the equalized rates or the rates to New Orleans with the differentials added. We also pointed out that under the differential plan ordered by the Commission the entire function of interstate transportation is warped and thrown out of joint, and the shipper, whose interests have been so zealously guarded by the Commission and by the Courts, is deprived of the opportunity to use the port of his choice on his export, import and coast-wise traffic by a narrow and restricted interpretation of Section 3. We readopt the brief filed on behalf of the State of Louisiana in all particulars, reiterate the arguments made therein, and submit that the decision of the lower court should be reversed, the order of the Interstate

Commerce Commission should be held arbitrary and invalid, and should be set aside for reasons now and previously insisted on.

Respectfully submitted,

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